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No. 196

IN THE

Supreme Court of the United States

OCTOBER TERM, 1903

JOSEPH R. BINNS

Plaintiff in Error

vs.

THE UNITED STATES

In Error to the District Court of the United States
for the District of Alaska

Brief for Plaintiff in Error.

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JOSEPH R. BINNS,
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vs.

THE UNITED STATES.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This writ of error has been granted to review a judgment made, given and entered in and by the United States District Court for the District of Alaska, Second Division, on appeal from the United States Commissioner's Court for the precinct of Nome.

The plaintiff in error (defendant below), by a complaint filed in the Commissioner's Court, was accused of the crime of carrying on the business of a transfer company without a license. It is alleged in the complaint, "That said Joseph R. Binns * * * did

"* * * wrongfully and unlawfully prosecute and "carry on the business of a transfer company without "first applying for and obtaining a license so to do "from the District Court of the District of Alaska, "Second Division thereof" (Trans., p. 1). The defendant pleaded not guilty, was tried, convicted and adjudged to pay a fine (Trans., p. 4). An appeal was duly taken to the District Court (Trans., p. 2). The defendant therein answered to the complaint admitting that he did carry on such business without a license, but alleging that the statute under and by virtue of which the prosecution was maintained, is unconstitutional and void (Trans., p. 8). The defendant submitted the cause upon the complaint and answer, and was by the Court found guilty as charged, and the judgment now before this Court for review was made and entered that defendant be fined the sum of fifty dollars and costs (Trans., p. 10).

ASSIGNMENT OF ERRORS.

First. The said District Court had no jurisdiction of said action or of the person of the defendant.

Second. The said Court erred in finding the defendant guilty and in pronouncing judgment upon the defendant, for that Section 460 of the Act entitled "An "Act to define and punish crimes in the District of "Alaska, and to provide a code of criminal procedure "for said District," approved March 3, 1899, as

amended by Section 29, Title I of the Act entitled "An Act making further provision for a civil government for Alaska and for other purposes," approved June 6, 1900, under which said section the defendant is proceeded against herein, is unconstitutional and void, by reason of being in conflict with and repugnant to the provisions of paragraph One of Section Eight of Article One of the Constitution of the United States.

Third. The complaint filed herein does not state facts sufficient to constitute a crime or public offense.

Fourth. The Court erred in overruling the plea of defendant.

BRIEF OF ARGUMENT.

I.

This Court has jurisdiction to review the judgment of the District Court of Alaska, upon writ of error.

II.

The statute under and by virtue of which this plaintiff in error was proceeded against is unconstitutional.

I.

THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE DISTRICT COURT OF ALASKA UPON WRIT OF ERROR.

The Act of March 3, 1899, entitled "An Act to de-
" fine and punish crimes in the District of Alaska and
" to provide a code of criminal procedure for said
" district," provides (Part II, Chap. 21, Sec. 202):
" That appeals and writs of error in criminal actions
" may be taken and prosecuted from the decisions and
" judgments of the District Court of the District of
" Alaska to the Supreme Court of the United States,
" or to the Circuit Court of Appeals for the Ninth
" Circuit, in the same manner and under the same
" regulations as from the Circuit and District Courts
" of the United States, under the Acts of Congress
" now in force or that may be hereafter enacted."

The Act of March 3, 1891, entitled "An Act to estab-
" lish Circuit Courts of Appeals and to define and
" regulate in certain cases the jurisdiction of the
" Courts of the United States, and for other pur-
" poses," provides (Sec. 5): "That appeals or writs
" of error may be taken from the District Courts and
" the existing Circuit Courts direct to the Supreme
" Court in the following cases: * * * In a case
" that involves the construction or application of the
" Constitution of the United States. In any case in
" which the constitutionality of any law of the United

" States, or the validity or construction of any treaty " made under its authority, is drawn in question."

In *Motes* vs. *United States* (178 U. S., 459, 466) this Court has said: "The Assistant Attorney-General sug- " gests as worthy of consideration whether, under this " interpretation of the statutes, the present case can " be brought directly from the Circuit Court. This " suggestion is based upon the provision in the Act " of January 20, 1897, C. 68, which withdraws from " the consideration of this Court, upon appeal or writ " of error direct from the Circuit Court, cases of con- " viction of infamous crimes not capital, and gives " jurisdiction in such cases, upon appeal or writ of " error, only to the proper Circuit Court of Appeals; " and it is assumed that no criminal case can, upon " any ground, be brought here directly from a Circuit " Court of the United States, unless it be a case of con- " viction of a capital crime. 29 Stat., 492. But such " is not the law. Among other cases, this Court, under " the Act of March 3, 1891, 26 Stat., 826, C. 517, estab- " lishing Circuit Courts of Appeals, can take cogni- " zance of a criminal case, upon writ of error to re- " view the judgment of a Circuit Court, when the case " really 'involves the construction or application of " the Constitution of the United States.' That Act " does not make a distinction between civil and crim- " inal causes such as is implied by the above sugges- " tion of the Government."

II.

The Statute Under and by Virtue of Which This Plaintiff in Error Was Proceeded Against Is Unconstitutional.

Section 460 of Part II of the Alaska Penal Code (Act of March 3, 1899, Title II), as amended by the Act of June 6, 1900, entitled "An Act making further "provision for a civil government for Alaska, and for "other purposes," provides "That any person or per- "sons, corporation, or company prosecuting or at- "tempting to prosecute any of the following lines of "business within the District of Alaska, shall first "apply for and obtain license so to do from a District "Court or a subdivision thereof in said district, and "pay for said license for the respective lines of busi- "ness and trade as follows, to-wit: * * * Trans- "fer companies, fifty dollars per annum."

Section 461 provides: "That any person, corpora- "tion, or company doing or attempting to do busi- "ness in violation of the provisions of the fore- "going section, or without having first paid the "license therein required, shall be deemed guilty "of a misdemeanor," etc.

Section 463 provides: "That the licenses provided "for in this Act shall be issued by the clerk of the "District Court or any subdivision thereof, duly made "and entered; * * * provided, that * * * "all moneys received for licenses by him * * *

"under this Act shall, except as otherwise provided by "law, be covered into the treasury of the United States, "under such rules and regulations as the Secretary "of the Treasury may prescribe."

Section 8 of Article I of the Constitution of the United States provides: "The Congress shall have "power to lay and collect taxes, duties, imposts and "excises, to pay the debts and provide for the com- "mon defence and general welfare of the United "States; but all duties, imposts and excises shall be "uniform throughout the United States."

The license tax required by Section 460 of the Penal Code, above quoted, is an excise (*Cooley on Taxation*, page 4).

Is the license tax such an excise as is required by the Constitution to be "uniform throughout the United States"?

That the excise is laid and collected "to pay the "debts and provide for the common defence and gen- "eral welfare of the United States," appears from Section 463: "All moneys received for licenses "* * * under this Act shall * * * be covered "into the treasury of the United States." The moneys so collected do not constitute a special fund provided for local purposes, but are "covered into the treasury of the United States" and become part of the general funds of the Federal Government, subject to

appropriation for any purpose which Congress may see fit, within its constitutional restrictions—that is, "to pay the debts and provide for the common defence and general welfare."

Certain taxes imposed by the Act of June 6, 1900, are laid for local purposes and paid into a local depository. Thus Section 32 of Title I of that Act provides: "For each certificate issued to a mem- "ber of the bar, authorizing him to practice law "in the district, a fee of ten dollars shall be paid to "the clerk of the Court, which shall be by him prompt- "ly *remitted to the secretary of the district,* * * * "For each commission issued to a notary public a fee "of ten dollars shall be paid to the secretary of the "district. The fees received by the secretary under "this section and under Chapter Seventy-four of Title "Two *shall be by him retained and kept in a fund* to "be known as the district historical library fund. "The fund thus collected shall be disbursed on the "order of the governor for the purpose of establish- "ing and maintaining the district historical library "fund."

We do not find that any further taxes are laid for local purposes, except such taxes as municipal corporations are authorized to impose (Act of June 6, 1900, Title III, Section 201). All the expenses of the territorial administration are paid by appropriation from the United States treasury. The expenses of erecting

an asylum and caring for the insane are to be paid out of the treasury (Act of June 6, 1900, Title I, Section 2); the salaries of the governor, surveyor-general, judges, marshal, clerks and district attorneys are payable out of the treasury (id., id., Section 10).

By the Act of March 3, 1901, entitled "An Act mak- " ing appropriations for the legislative, executive and " judicial *expenses of the Government,*" etc., appropriation is made "out of any money in the treasury not otherwise appropriated" for the Territory of Alaska for the salaries of these officers and "for incidental and contingent expenses of the territory." The General Appropriation Acts of April 28, 1902, and of February 25, 1903, make similar appropriations.

It is thus apparent that not only do Alaskan license taxes become a part of the general fund, but that the governmental expenses of the territory are considered by Congress as expenses incidental to the general welfare of the United States. Obviously this license tax is an excise required to be uniform throughout the United States.

Is Alaska a portion of the United States, within the meaning of this provision of the Constitution?

Section 1891 of the Revised Statutes provides: "The " Constitution and all laws of the United States which " are not locally inapplicable shall have the same force " and effect within all the organized territories, and

" in every territory hereafter organized as elsewhere " within the United States."

The Act of May 17, 1884, entitled "An Act providing a civil government for Alaska," provided: "That the " territory ceded to the United States by Russia by " the treaty of March thirtieth, eighteen hundred and " sixty-seven and known as Alaska, shall constitute a " civil and judicial district, the government of which " shall be organized and administered as hereinafter " provided."

The Act of June 6, 1900, entitled "An Act making " further provision for a civil government for Alaska, " and for other purposes," similarly provided.

This Court has said in *Steamer Coquitlam* vs. *United States* (163 U. S., 346, 352): "Alaska is one of the territories of the United States," and in *Downes* vs. *Bidwell* (182 U. S., 244, 335), Mr. Justice White says: " Without referring in detail to the acquisition from " Russia of Alaska, it suffices to say that that treaty " also contained provisions for incorporation and was " acted upon."

The Constitution having once been extended to a territory cannot be withdrawn, nor its provisions modified by subsequent legislation inconsistent therewith. It becomes the supreme law and operates as a restriction upon the power of Congress to legislate in regard to such territory, identically as it operates to restrict legislation in regard to States. As this Court has said in *Downes* vs. *Bidwell* (182 U. S., 244, 270), referring to

Springville vs. *Thomas* (166 U. S., 707): "It was also "intimated that Congress 'could not impart the power "to change the constitutional rule,' which was obvi- "ously true with respect to Utah, since the organic "Act of that territory had expressly extended to it "the Constitution and laws of the United States. As "we have already held, that provision once made "could not be withdrawn. If the Constitution could "be withdrawn directly, it could be nullified indirectly "by acts passed inconsistent with it. The Constitu- "tion would thus cease to exist as such, and become "of no greater authority than an ordinary Act of "Congress."

And in that case it was further said (page 271): "That where the Constitution has been once formally "extended by Congress to territories, neither Congress "nor the territorial legislature can enact laws incon- "sistent therewith."

In the concurring opinion of Mr. Justice White, it is said (page 341): "That whilst in an international "sense Porto Rico was not a foreign country, since "it was subject to the sovereignty of and was owned "by the United States, it was foreign to the United "States in a domestic sense, *because the island had "not been incorporated into the United States, but "was merely appurtenant thereto as a possession.* As "a necessary consequence, the impost in question "* * * was within the power of Congress, and that "body was not, moreover, as to such imposts, con-

" trolled by the clause requiring that imposts should " be uniform throughout the United States." (Our italics.)

By necessary inference, had Porto Rico been incorporated into the United States, Congress would have been controlled by that clause.

Mr. Justice Gray in his concurring opinion says (page 345): "The cases now before the Court do not " touch the authority of the United States over the " territories, in the strict and technical sense, being " those which lie within the United States, as bounded ' by the Atlantic and Pacific oceans, the Dominion of " Canada and the Republic of Mexico, and the terri- " tories of Alaska and Hawaii; but they relate to ter- " ritory, in the broader sense, acquired by the United " States by war with a foreign state."

The dissenting opinion of Mr. Justice Harlan is to the effect that Porto Rico, after the ratification of the treaty of Spain became an integral part of the United States, and in this case when the premise that Alaska is such a part of this country is firmly estab lished by the decisions of this Court, the conclusion at which he arrives is authority. He says (page 391): " In my opinion Porto Rico became, at least after the " ratification of the treaty with Spain, a part of and " subject to the jurisdiction of the United States in " respect of all its territory and people, and Congress " could not thereafter impose any duty, impost or ex- " cise with respect to that island and its inhabitants,

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"which departed from the rule of uniformity estab-
"lished by the Constitution."

In the premises it is respectfully submitted that the judgment of the District Court be reversed.

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